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In the Supreme Court of the United States

OCTOBER TERM, 1957

OLETA O'CONNOR YATES, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In its decision of November 25, 1957 (*Yates* v. *United States*, 355 U.S. 66), affirming, as to specification I, petitioner's conviction of criminal contempt of the United States District Court for the Southern District of California, this Court reversed the remaining specifications, II-XI, inclusive, pursuant to its holding (*id*, at 72-74) that petitioner's several refusals to answer the questions there in issue, put to her while under cross-examination as a witness in her own be-

half at her trial for conspiracy to violate the Smith Act, constituted in legal effect but one contempt. Since petitioner's several one-year sentences—one under each specification—had been designated to run concurrently, the reversal as to specifications II-XI did not have the effect of reducing her total sentence in a practical sense. This Court, recognizing the possibility that the District Court's "judgment as to the proper penalty was affected by the view that petitioner had committed 11 separate contempts" (*id*, at 75), vacated the sentence under specification I and remanded the case to the District Court "for resentencing in the light of this opinion" (*id*, at 76).

In addition, this Court referred to a number of factors which it thought "point[ed] up the necessity * * * of having the trial judge reconsider the sentence in the cool reflection of subsequent events" (*ibid.*). These factors were essentially as follows: that petitioner had "served a total of over 70 days in jail awaiting final disposition of the several proceedings against her"; that her "conspiracy conviction" (under the Smith Act) and another criminal contempt conviction had been reversed; that the Court of Appeals had termed the one-year sentence imposed for the acts of contempt involved in the proceedings at bar "severe"; the "understandable reluctance to be an informer" which petitioner said had motivated her to refuse to answer the questions; her "apparently courteous demeanor" while declining to answer; and "the fact that her refusals seem to have had no perceptible effect on the outcome of the trial" (*id*, at 75-76). The Court observed that the District Court, on remand, should consider the "extent of the willful and deliberate de-

fiance of the court's order [and] the seriousness of the consequences of the contumacious behavior" (*id*, at 75, quoting from *United States* v. *United Mine Workers*, 330 U.S. 258, 303).[1]

On January 28, 1958, the District Court (Mathes, D. J.) again sentenced petitioner to one year's imprisonment on specification I (Pet. App. 11). In a written opinion filed in connection with the resentencing (Pet. App. 3-11), Judge Mathes fully stated his reasons for doing so.

Adverting to this Court's direction to consider "the extent of the willful and deliberate defiance of the court's order [and] the seriousness of the consequences of the contumacious behavior," Judge Mathes stated his understanding of the instruction to be that he should consider the extent of the defiance and the seriousness of the consequences "in the setting that existed at the time—remembering not alone the words spoken as recorded in the stenographic transcript, but also everything that occurred in the presence of this court in connection with the matter" (Pet. App. 6). Among other factors to which he referred in his opinion as not reflected in the transcript, and which he said he was taking into consideration in reimposing a one-year sentence, was his recollection (Pet. App. 8) that

> [i]n the words spoken, yes, defendant Yates was courteous; but in attitude she was the most coldly

[1] The Court also noted that, because the contempt sentence was ordered to commence upon completion of the five-year sentence in the conspiracy case, which had in the meantime been reversed by this Court (*Yates* v. *United States*, 354 U.S. 298), the date on which service of the contempt sentence was to commence had been rendered uncertain (355 U.S. at 76, fn. 10).

> defiant and wholly contemptuous witness I have ever seen in more than thirty years at the bar and on the bench.

"Moreover," he said, "her contempt was real. She in fact evinced sincere and utter contempt—not alone for the authority of the court, but also for the American system of government and justice—as she sat on the witness stand and, in the presence of the jury and the bar and a courtroom crowded with spectators, repeatedly and defiantly refused to bow to the authority of the court" (*ibid.*).

"Like one speaking words of apology while thumbing his nose at the person addressed," Judge Mathes' opinion continues, "defendant Yates showed her contempt by action and demeanor rather than words. The cold printed record of the 'courteous' words spoken unhappily cannot reveal to the reader the insincere mockery of impeccable manners, the condescending attitude of contemptuous superiority revealed in the inflection of voice, the expressions of the face and the hands, the shrug of the shoulders" (*ibid.*).

The opinion mentions also the "all-but-audible 'cheering' and 'booing' of the 'rooting section' in the audience; the supercilious half-smirk, half-smile visages of the thirteen co-defendants who inaudibly applauded every defiance" (Pet. App. 8-9). "I only regret my inability to describe adequately," the judge stated (*id.* 9),

> the corrupting influence upon the entire trial scene of the defendant's conduct in repeatedly displaying for all present the consummate in disrespect and contempt for the authority of the trial court.

Indicating that he had "reconsidered the sentence in the light of the Supreme Court's opinion, as the mandate of the Court has directed," Judge Mathes concluded his opinion by stating that he sentenced petitioner to imprisonment for one year "[i]n the interest of justice and to vindicate the authority of the court in this case" (Pet. App. 11).

The Court of Appeals, on February 7, 1958, declined to alter the sentence (Pet. App. 1-2). "As we said in our original opinion," the court said, "the sentence is severe, but, in our view, the sentence is within constitutional bounds and within the area reserved to the trial court's discretion and not to be disturbed by this court" (*id,* 1). "We interpret the mandate of the Supreme Court's opinion to be that the trial judge should take another look at some ameliorating circumstances which it listed," the Court of Appeals continued. "It issued no command that the sentence be reduced" (*id,* 2). "We find nothing different here," said the court, "tha[n] obtains in every case where the defendant thinks he was sentenced too heavily and has no other claim on which to attack his sentence" (*ibid.*).[2]

The petition for a writ of certiorari was filed on March 7, 1958. We submit it presents no question meriting further consideration by this Court.

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[2] Upon counsel's representation that he intended to petition this Court for a writ of certiorari if his appeal to the Court of Appeals failed, the Court of Appeals ordered petitioner to be admitted to bail in the amount of $5,000 pending determination of such petition, provided such petition was filed within 30 days from the date of affirmance (Pet. App. 2). Petitioner, having furnished the aforesaid bail, has been at liberty since February 12, 1958 (Pet. 9).

1. While conceding that "[i]t is, of course, true that this Court in remanding did not suggest the amount of punishment," petitioner intimates, nevertheless, that the District Court obeyed "[n]either the letter nor the spirit of the opinion and mandate of this Court" in failing to reduce the sentence originally imposed (Pet. 11). We submit that there is no merit in the suggestion. This Court directed the District Court to take into consideration the several factors mentioned in its opinion (*supra*, pp. 2-3) in resentencing petitioner, but in nowise suggested that the court's discretion as to the amount of the sentence (those factors having been taken into account) should be curtailed or limited. The Court of Appeals correctly observed that this Court "issued no command that the sentence be reduced" (Pet. App. 2).

2. Petitioner urges, however (Pet. 10-18), that Judge Mathes "arbitrar[ily] refus[ed] to consider or to apply the specified mitigating factors" (Pet. 10) mentioned in this Court's opinion. He "essentially disregarded," it is said, "every circumstance which led this Court to vacate the original sentence and which [he] was requested to consider on resentence" (Pet. 11). This contention is not supported by the record. Judge Mathes explicitly states in his opinion that he "reconsidered the sentence in the light of the Supreme Court's opinion, as the mandate of the Court has directed" (Pet. App. 11; see, also, *id*, at 5-6). His opinion (*id*, 3-11) reflects, moreover, that he read and considered this Court's opinion with care. Some of the factors mentioned therein he quotes and discusses at length (see *id*, at 6, 7, 8-9). There is, we believe, no basis for the suggestion (see, *e.g.*, Pet. 12. 17) that factors mentioned by this Court which are not ex-

pressly alluded to in Judge Mathes' opinion were ignored by him.

Equally insubstantial is the contention (Pet. 12) that the judge, by referring in his opinion to petitioner's "repeated" defiance of the court (*e.g.*, Pet. App. 5), in effect disregarded this Court's decision that her repeated refusals to answer constituted but one contempt in law. While her contempt was single in substance, her refusals (collectively constituting one offense) were in fact repeated over a period of time. The judge implied nothing more.

The factors stressed by Judge Mathes as considerations which influenced him to reimpose a one-year sentence (*supra*, pp. 3-4)—*i.e.*, attitudes and innuendoes displayed by petitioner which, not appearing from the cold print of the record, could only be seen or sensed by the participants in the living courtroom scene—have frequently been recognized as factors which may be taken into account by the trial judge. Indeed, it is because of these factors that punishment for contempt is so peculiarly a matter to be left in very large measure to his discretion. *E.g., Fisher* v. *Pace*, 336 U.S. 155, 161; *Hallinan* v. *United States*, 182 F. 2d 880, 888 (C.A. 9), certiorari denied, 341 U.S. 952.[3]

Nor is there substance to petitioner's complaint that

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[3] "In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude * * *" (*Fisher* v. *Pace*, *supra*, 336 U.S. at 161).

"We cannot have the same appreciation of an existing situation, from a review of a cold record, as does a presiding judge who witnesses the transgressions and senses the unfavorable impact upon the orderly administration of justice" (*Hallinan* v. *United States*, *supra*, 182 F. 2d at 888).

it was error for Judge Mathes to take account of "the 'all-but-audible' action of the audience" and "the 'inaudible' applause or visages of her co-defendants" because "[t]hese were extraneous and irrelevant matters" for which she "was in no way responsible" (Pet. 23-24). While she is not chargeable with responsibility for the actions of her "cheerers" and "rooters," there was no duty on Judge Mathes' part to disregard (if such were possible) these background factors in the courtroom scene as he recalled petitioner's actions and attitudes (*supra*, pp. 3-4) and sought to evaluate the extent to which her own conduct displayed "disrespect and contempt for" his authority as presiding judge (Pet. App. 9).[4]

3. Petitioner's contention that the length of the sentence imposed was in part the product of the judge's giving consideration to "irrelevant" and "extraneous" factors (Pet. 19-24) likewise presents no issue requiring the further consideration of this Court.

Whether petitioner's action in taking the stand was taken in good faith for the purpose of "giv[ing] evidence on the issue of her state of mind or intent," or whether this was merely a "cleverly-staged stratagem, affording her the opportunity in effect to argue the defendants' case to the jury while purporting to give [such] evidence" (Pet. App. 4), was a legitimate con-

[4] Petitioner's suggestion (Pet. 25-26) that her trial for contempt should have been prosecuted on notice and hearing under Rule 42(b), F.R. Crim. P., rather than summarily under Rule 42(a), is plainly lacking in merit. Its premise is that her sentence "was based principally upon charges of alleged conduct not occurring in the presence of the court" (Pet. 25). The record is clear, however, and nothing now advanced by petitioner is to the contrary, that her misconduct took place entirely in the presence of the court.

sideration for the judge to take into account in assessing the penalty for her admitted offense. And from his position of vantage as presiding judge, Judge Mathes was competent to infer, we believe, which of these hypotheses was the true one. If a "stratagem" was involved, as Judge Mathes believes, it was not necessarily planned "out of the Court's presence," as petitioner suggests (Pet. 19), nor would it be material, we think, if the judge's conviction in this respect may not have been arrived at (see Pet. 20-21) until some time after the trial had been concluded.

Whether petitioner's contumacy was "planned, deliberate, and cynical", as Judge Mathes believes it was (Pet. App. 8), or whether petitioner took the stand without any subjective reason to anticipate that in so doing she might be called upon to give testimony which she was determined at all events to withhold (see Pet. 22-23), was likewise a permissible factor for the judge to take into consideration in imposing sentence, and Judge Mathes was, here too, the person best qualified to determine whether the one or the other of these alternatives was true. And there is nothing, it is submitted, in the judge's allusion to the likelihood that an offense similar to petitioner's would be punished more severely "in Communist Russia" than in this country (Pet. App. 11) to give substance to her complaint (Pet. 24) that the relative rigor of the Soviet penal system was a factor taken into consideration in the selection of an appropriate sentence here. This is also true of the judge's passing reference to aspects of petitioner's testimony at the main trial on the issue of forcible overthrow and her intent and understanding with respect thereto (Pet. App. 7). And even if, as she claims (Pet. 21-22), he misinterpreted her testimony in these

respects, that fact would not be a ground for this Court to interfere with his exercise of discretion as to a suitable penalty for her admitted offense.

4. Petitioner renews her contention (Pet. 26-30), also advanced when her case was here before (see 355 U.S. at 71), that the imposition of a one-year sentence under all the circumstances here obtaining was violative of due process and of the Eighth Amendment's prohibition against "cruel and unusual punishments." This argument was, however, implicitly rejected by this Court when, in remanding the case for resentencing in the light of the factors mentioned in its opinion, it refrained from delimiting the freedom of the trial judge to impose such punishment as he thought fitting after taking those factors into account. The present petition presents no grounds for reaching a different result at this time. On the contrary, the contention is even less persuasive now than it was before. The significant factors which Judge Mathes refers to in his opinion on resentencing as having influenced him to impose originally, and to reimpose upon remand, a one-year sentence (see *supra*, pp. 3-5) were not reflected in the original record before this Court.

For the foregoing reasons, we believe that the reimposition of a one-year sentence was consistent with this Court's opinion and mandate, that it was not arbitrary or unreasonable, and that the petition for a writ of certiorari should be denied. If, however, the Court should be of the view that the sentence imposed, under all the circumstances, is unduly severe, it is suggested that it would be appropriate for the Court, without further briefs or argument, to effect such

modification as it may deem proper. Cf. *United States* v. *United Mine Workers*, 330 U.S. 258, 304-305; *Green and Winston* v. *United States*, No. 100, this Term, decided March 31, 1958, slip op., p. 22.

Respectfully submitted.

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